

**United States Department of Labor
Employees' Compensation Appeals Board**

M.E., Appellant)	
)	
and)	Docket No. 20-0922
)	Issued: February 5, 2021
U.S. POSTAL SERVICE, PLANTATION)	
BRANCH POST OFFICE, Plantation, FL,)	
Employer)	
)	

Appearances:
Joanne Wright, Representative for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On March 24, 2020 appellant, through her representative, filed a timely appeal from a November 26, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$73,689.81 for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period December 1, 2011 through March 30, 2019 without an appropriate offset; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$600.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On March 13, 1997 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date two dogs chased her, causing her to fall and suffer injuries to her wrists and left knee, while in the performance of duty. OWCP accepted the claim for bilateral wrist sprain, internal derangement/meniscus tear of the left knee, reflex sympathetic dystrophy bilateral knees, right ankle closed fracture, post-traumatic stress disorder, and thoracic or lumbosacral neuritis or radiculitis. Appellant stopped work on January 17, 1998 to undergo OWCP-authorized arthroscopic surgery of her left knee. She returned to work for four hours per day as of June 10, 1998 and eight hours per day with restrictions as of March 25, 1999. On October 9, 2001 appellant accepted a modified letter carrier position for four hours a day with restrictions. On December 25, 2004 she stopped work again and did not return. OWCP paid appellant wage-loss compensation on the periodic compensation rolls. Appellant was subsequently approved for disability retirement under the Federal Employees Retirement System (FERS) by the Office of Personnel Management (OPM) by letter dated June 25, 2009. On January 29, 2010 she elected FECA wage-loss compensation benefits in lieu of OPM retirement benefits.

On December 15, 2011, December 12, 2013, December 8, 2014, December 8, 2015, December 12, 2016, December 16, 2017, and December 16, 2018 appellant completed EN1032 forms in which she indicated that she had not received any retirement benefits from SSA during the past 15 months part of an annuity for federal service.

On January 29, 2019 OWCP forwarded a FERS/SSA dual benefits calculation transmittal to SSA and requested that SSA provide information regarding appellant's receipt of SSA age-related benefits with and without FERS.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the November 26, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

On March 11, 2019 OWCP received the March 7, 2019 completed FERS/SSA dual benefits calculation transmittal from SSA. This form indicated appellant's SSA benefit rates with a FERS offset and without a FERS offset from December 2011 through December 2018. Beginning December 2011, SSA rate with FERS was \$1,292.40 and without FERS was \$491.30. Beginning December 2012, SSA rate with FERS was \$1,314.30 and without FERS was \$499.60. Beginning December 2013, SSA rate with FERS was \$1,334.00 and without FERS was \$507.00. Beginning December 2014 and beginning December 2015, SSA rate with FERS was \$1,356.60 and without FERS was \$515.60. Beginning December 2016, SSA rate with FERS was \$1,360.60 and without FERS was \$517.10. Beginning December 2017, SSA rate with FERS was \$1,387.80 and without FERS was \$527.40. Beginning December 2018, SSA rate with FERS was \$1,426.60 and without FERS was \$542.10.

On April 16, 2019 OWCP prepared a FERS offset calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from December 1, 2011 through March 30, 2019. The total overpayment was determined to be \$73,689.81. OWCP found that appellant received an overpayment of compensation in the amount of \$9,666.02 for the period December 1, 2011 through November 30, 2012; \$9,803.26 for the period December 1, 2012 through November 30, 2013; \$9,951.26 for the period December 1, 2013 through November 30, 2014; \$10,119.73 for the period December 1, 2014 through November 30, 2015; \$10,147.45 for the period December 1, 2015 through November 30, 2016; \$10,149.81 for the period December 1, 2016 through November 30, 2017; \$10,353.16 for the period December 1, 2017 through November 30, 2018; and \$3,499.12 for the period December 1, 2018 through March 30, 2019. SSA noted on the form that appellant had begun receiving age-related retirement benefits in December 2011, prior to that time she was in receipt of disability benefits.

Based on information provided by SSA regarding the amount of appellant's age-related retirement benefits, which were attributable to federal service, OWCP adjusted appellant's FECA wage-loss compensation effective March 31, 2019.

On April 16, 2019 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$73,689.81 had been created. It explained that the overpayment occurred because appellant's SSA age-related retirement benefits that she received from December 1, 2011 through March 30, 2019 were partially based on credits earned while working for the Federal Government, and that this portion of her SSA benefit constituted a prohibited dual benefit. OWCP found appellant not at fault in the creation of the overpayment as she could not have reasonably known that she was paid compensation incorrectly and forwarded an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It requested that she complete the questionnaire and provide supporting financial documentation, including income tax returns, bank account statements, bills, and cancelled checks, pay slips, and any other records to support her reported income and expenses. OWCP afforded appellant 30 days to respond.

On May 6, 2019 appellant requested a telephonic prerecoupment hearing before OWCP's Branch of Hearings and Review regarding possible waiver of the overpayment. Appellant argued that recovery of the overpayment would be against equity and good conscience as, over the last eight years, she was put in the position of spending and committing funds in ways, which she otherwise would not have done. She indicated that she would suffer financial hardship in trying

to repay the huge overpayment and had no reasonable way of knowing that an overpayment had occurred. In an attached Form OWCP-20, also completed on May 6, 2019, she reported her household's monthly income as \$6,738.00, recurring monthly expenses as \$4,903.71, assets as \$85,290.00. Copies of financials and billing statements were provided.

A telephonic hearing was held on September 12, 2019. Appellant's representative argued that appellant believed that her entitlement to SSA benefits were not part of an annuity, but based on her disability. She also indicated that the annual SSA benefits reported on appellant's SSA forms 1099 during the years 2011 through 2019 were less than the rates reported by SSA on the dual benefits transmittal form. Appellant's representative submitted copies of appellant's SSA forms 1099 from 2011 through 2019 and included a summary of appellant's SSA benefits as reported on SSA forms 1099 yearly, and reduced to monthly amounts. She also summarized the monthly rates reported by SSA in the SSA/FERS transmittal forms for SSA benefits with FERS.

The SSA 1099 forms reflected that: in 2011, appellant received SSA age-related retirement benefits in the amount of \$14,970.00 (\$1,247.50 monthly); in 2012, she received \$15,502.00 (\$1,291.83 monthly); in 2013, she received \$15,766.80 (\$1,313.90 monthly); in 2014, she received \$16,006.80 (\$1,333.90 monthly); in 2015, she received \$16,270.80 (\$1,355.90 monthly); in 2016, she received \$16,270.80 (\$1,355.90 monthly); in 2017, she received \$16,320.00 (\$1,360.00 monthly); in 2018, she received \$16,644.00 (\$1,387.00 monthly); and in 2019, she received \$17,118.20 (\$1,426.60 monthly). The representative noted that appellant had adjusted her expenditures based on the current amount of monthly benefits and requested that the preliminary overpayment be rescinded. Appellant testified that both the assets and income amounts listed on the Form OWCP-20 remained the same, but some of the enumerated monthly expenses increased. The hearing representative explained that she needed more substantial documentation to consider her request for waiver. Appellant was also offered the opportunity to submit a repayment plan. The record was held open for 30 days for the submission of additional evidence.

In an October 1, 2019 statement, appellant reiterated that she believed she should be granted waiver. She noted that she was unable to provide a payment plan as she did not believe she could be penalized for an error that was not her fault. Appellant enclosed additional financial documents regarding expenses.

By decision dated November 26, 2019, an OWCP hearing representative finalized OWCP's preliminary overpayment determination, finding that appellant received an overpayment of \$73,689.81 for the period December 1, 2011 through March 30, 2019. Regarding the amount of the overpayment, the hearing representative related that she had reviewed the SSA 1099 forms and other statements received and that this evidence was insufficient to show that the offset information provided by SSA was incorrect. The hearing representative further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record was insufficient to establish that recovery would defeat the purpose of FECA or would be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$600.00 from appellant's continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.⁴ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁵

Section 10.421(d) of OWCP's implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁶ FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁷

ANALYSIS -- ISSUE 1

The Board finds that fact of overpayment has been established.

The evidence of record indicates that, while appellant was receiving compensation for wage-loss compensation benefits under FECA, she was also receiving SSA age-related retirement benefits based upon her federal service. A claimant cannot receive both wage-loss compensation under FECA and SSA age-related retirement benefits attributable to federal service for the same period.⁸ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period December 1, 2011 through March 30, 2019. Consequently, the fact of overpayment has been established.

The Board further finds, however, that this case is not in posture for decision with regard to the amount of the overpayment.

To determine the amount of the overpayment, the portion of SSA's benefits that were attributable to federal service must be calculated. OWCP received a dual benefits calculation transmittal from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided its rate with FERS and without FERS for specific periods from December 1, 2011 through March 30, 2019. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that she received an overpayment in the amount of \$73,689.81. However, appellant submitted SSA 1099 forms for

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see P.B.*, Docket No. 20-0862 (issued November 25, 2020); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

⁷ FECA Bulletin No. 97-09 (February 3, 1997); *see P.B., id.*; *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁸ *Supra* note 7.

the years 2011 and onward, which documented the amounts of SSA benefits appellant received each year from SSA. The benefit amounts shown on the SSA 1099 forms differed from the amounts shown on the SSA/FERS transmittal calculation forms. The hearing representative found that such evidence was insufficient to show that the offset information provided by SSA was incorrect. The hearing representative, however, offered no explanation regarding the discrepancy in the benefit amounts SSA reported as received by appellant on the 1099 forms, which were less than the rates reported by SSA for appellant's SSA age-related benefits, which included FERS and other SSA contributions.

The Board has previously explained that, if the record contains documentation evidencing discrepancy in the amounts of SSA age-related benefits the claimant actually received, OWCP must provide a clear explanation of the discrepancy.⁹ A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.¹⁰ The Board finds that the overpayment decision in this case does not provide such an explanation.¹¹ In the present case, SSA provided 1099 forms to appellant during the years in question which recorded amounts of benefits paid, which differed from the benefit rates SSA reported to OWCP on the March 11, 2019 SSA/FERS dual benefits calculation transmittal. The Board finds that as OWCP did not attempt to clarify the discrepancy and has not explained the discrepancy, it has not established the amount of the overpayment in question.

On remand OWCP shall determine the exact amount of the overpayment of compensation. It shall then issue a new preliminary overpayment determination, with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide supporting financial information. After this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision.¹²

CONCLUSION

The Board finds that fact of overpayment has been established. The Board further finds that this case is not in posture for decision with regard to the amount of the overpayment.

⁹ See *M.M.*, Docket No. 17-0560 (issued August 23, 2017).

¹⁰ *L.B.*, Docket No. 19-1322 (issued January 27, 2020); *A.J.*, Docket No. 18-1152 (issued April 1, 2019); *J.W.*, Docket No. 15-1163 (issued January 13, 2016); see also *O.R.*, 59 ECAB 432 (2008) (with respect to overpayment decisions, OWCP must provide clear reasoning showing how the overpayment was calculated).

¹¹ *R.B.*, Docket No. 20-0022 (issued October 28, 2020); *id.*

¹² As the case is not in posture for decision regarding the amount of overpayment, the issues of waiver and recovery of the overpayment are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 5, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board